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January 6, 1981

Ms. Faye Mills, Administrator
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Social Security Division
1777 W. Camelback Road
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ARIZONA ATTORNEY GENERAL

Re: 181-020(R80-220)

Dear Ms. Mills:

We have considered your request for our opinion on the authority of Arizona counties to make sick leave payments to county employees during their absence from work while sick. The question arises because of the efforts of several counties to establish sick leave payment plans which will conform to certain provisions of the federal Social Security Act which exclude from "wages" subject to social security contributions payments made to covered employees while they are absent from work during periods of illness. Specifically, that Act provides that employers and employees need not make Social Security contributions on payments made to employees "on account of sickness." 42 U.S.C. § 409.b. The question for resolution, therefore, is whether counties have the legal authority to make payments "on account of sickness" to their employees.

We conclude that, under Arizona law, counties have such legal authority.

The federal regulations promulgated under the Social Security Act provide that sick leave payments will be excluded from "wages" so long as the payments are paid pursuant to a "plan or system" which provides for "employees generally or for a class or classes of employees". 20 C.F.R. § 404.1049 (1980). In SSR (Social Security Ruling) 72-56 (1972), the Social Security Administration construed this regulation as requiring a legislative enactment which specifically appropriated funds for sick leave separate and apart from funds appropriated for salary payments. Under that ruling, payments made by a governmental entity to an employee on sick leave were excluded from "wages" only if the employer had authority to

make payments specifically on account of sickness as distinguished from authorization merely to continue salary payments during periods of absence due to illness. Under the authority of that ruling, the Social Security Administration in 1974 rejected Pima County's attempt to exclude from "wages" payments to its employees on account of sickness on the grounds that the county had no specific legislative appropriation and authority to make such payments.^{1/} Since that decision, the Social Security Administration has altered significantly its position on sick leave plans. In SSR 79-31 (1979), the Administration specifically modified SSR 72-56 (1972), by saying that sick leave payments made to employees would be excluded from the definition of "wages" so long as there is no specific constitutional or statutory prohibition which would preclude the county from making sick leave payments. This ruling vitiated any federal requirement of a specific statute or legislative appropriation authorizing sick leave payments. Therefore, a sick leave payment plan will now qualify under the social security regulations so long as there is no legal prohibition which would preclude an employer from making sick leave payments.^{2/}

1. To alter this result, two bills were introduced in the Arizona Legislature to authorize the county boards of supervisors to create a "sick pay fund" which was separate from the salary fund. See S.B. 1200, 34th Leg., 2nd Reg. Sess. (1980); H.B. 2433, 34th Leg., 1st Reg. Sess. (1979). Both bills failed to pass.

2. The Social Security Act, at least insofar as it applies to private employers and their employees, is administered by the Internal Revenue Service (collecting funds from employers and employees) and the Department of Health and Human Resources (HHR) (paying benefits). With respect to governmental employers, the Act is administered solely by HHR. Both the rate of tax to be paid, and the rate of benefit to be received are keyed to "wages" earned by the employee. The term "wages" used in this computation is defined identically under both the IRS statutes (26 U.S.C. § 3121) and under the HHR statutes (42 U.S.C. § 409). Both statutes provide that "wages" shall not include "payments made to an employee under a plan on account of sickness." Despite the similarity in language, the IRS has held that sick leave payments will be excluded from the definition of "wages" so long as the payments are paid

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Conceivably three constitutional provisions might preclude county governments from making sick leave payments. The first is Article 4, Part 2, Section 17 which provides:

The Legislature shall never grant any extra compensation to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract entered into, nor shall the compensation of any public officer . . . be increased or diminished during his term of office. . . ."

The second is Article 9, Section 7 which provides:

Neither the State, nor any county, city, town, municipality, or other subdivision of the State shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation, or become a subscriber to, or a shareholder in, any company or corporation, or become a joint owner with any person, company, or corporation, except as to such ownerships as may accrue to the State by operation or provision of law.

Finally, Article 22, Section 17 provides as follows:

All state and county officers (except notaries public) and all justices of the peace and constables, whose precinct includes a city or town or part thereof, shall be paid fixed and definite salaries, and they shall receive no fees for their own use.

(Footnote No. 2 continued)

"pursuant to a plan or system". Rev. Rul. 65-275 (1965). On the other hand, with respect to governmental employers, HHR has held that the payments must be made pursuant to a plan or system and additionally has stated that the governmental body must affirmatively show that it has legal authority (or lack of legal prohibition) to pay sick leave payments to employees. See SSR 72-56 (1972); SSR 70-31 (1979). This additional requirement of HHR was challenged in New Mexico v. Weinberger, 517 F.2d 989 (10th Cir. 1975), cert denied, 423 U.S. 1051 (1976). The court upheld the regulations stating that the variant construction was reasonable in light of constitutional prohibitions, typically existing in state constitutions, which preclude governmental bodies from making donations. (See e.g., Ariz. Const., Art. 9, § 7.).

We considered the applicability of these three constitutional provisions to sick pay plans in Ariz.Att'yGen.Op. No. 72-12 in which we concluded that the Legislature had the authority to establish a sick pay system^{3/} for State officers and employees. All of the constitutional provisions reviewed in Ariz.Att'yGen.Op. No. 72-12 are applicable to county governments as well as state government; therefore, we conclude that the Arizona Constitution does not preclude county governments from paying sick leave benefits to county employees.

Although we conclude that counties are not prohibited from making sick leave payments to county employees, our analysis cannot cease at that point. Whether counties are authorized to pay sick leave benefits depends upon statutory authority to do so, because the mere lack of legal prohibition does not confer authority upon a county to act. This proposition is firmly established in Arizona. In Maricopa County v. Black, 19 Ariz. App. 239, 506 P.2d 279 (1973), the court described county government as "not inherently omnipotent" and the "powers of counties are quite limited, generally even more limited than the powers of cities and towns." A county has only the powers expressly or by necessary implication delegated to it by the legislature. Associated Dairy Products Co. v. Page, 68 Ariz. 393, 206 P.2d 1041 (1949); Hart v. Bayless Investment & Trading Co., 86 Ariz. 379, 346 P.2d 1101 (1959). The court in Black, therefore, concluded that:

"the absence of any constitutional or statutory prohibition, if such be the case, does not mandate a conclusion that the county may engage in the conduct here questioned. The issue must be approached in the affirmative, that is, what constitutional or statutory authorization can the county rely upon to support its questioned conduct?" 19 Ariz. App. at 241, 506 P.2d at 281.

The general power of a county to spend is contained in A.R.S. § 11-201.4, which authorizes counties to "make such orders for the disposition or use of its property as the interests of the inhabitants of the county require". This provision, however, has been construed as not granting any

3. The Social Security Administration ruled in 1972 that the State had not established a sick pay plan that conformed to the Social Security Act.

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spending power independent from powers specifically granted. See Hartford Accident and Indemnity Co. v. Wainscott, 41 Ariz. 439, 19 P.2d 328 (1933), which held that counties lacked express or implied authority to expend public funds to purchase public liability insurance for the protection of county employees using county owned motor vehicles.

We note that other forms of "fringe benefits" are provided by statute expressly. A.R.S. § 11-263 authorizes a board of supervisors to adopt of a system of insurance (health, life, accident and disability) for the benefit of county personnel. A.R.S. § 11-251.37 authorizes a board of supervisors to provide payment for overtime work performed by county employees. A.R.S. § 38-704 authorizes a county board of supervisors to provide for coverage of county employees under the Social Security Act (42 U.S.C. § 401 et seq), and A.R.S. § 38-781.20 authorizes a county board of supervisors to adopt a retirement plan for employees and officers of the county.

We have not found a statute which expressly authorizes the plan in question; therefore, we must ascertain whether a statute impliedly authorizes the county to establish a plan to make payments to employees on account of sickness.

The only statute that we have found that conceivably authorizes such payments is A.R.S. § 11-409 which authorizes county officers, with the consent of the boards of supervisors, to employ various categories of personnel at salaries fixed by the boards of supervisors. We note also in that connection that A.R.S. § 11-601 established as county charges the salaries of county officers and employees and necessary expenses incurred in the conduct of their offices, as well as any other sum directed by law to be raised for a county purpose or declared to be a county charge. The boards of supervisors, in A.R.S. § 11-604, are authorized to create a salary fund and pay therefrom salaries of officials and employees. The boards are authorized also to "create and make payments from such other funds as necessary for the proper transaction of the business of the county."

We doubt that the payments in question are expenses incurred by county officers and employees in the conduct of their offices, and such payments are not directed by law to be made. The issue, therefore, essentially is whether the statutory authorization in A.R.S. § 11-409 to employ personnel and fix and pay salaries includes authorization to make payments on account of sickness, and whether such payments may be made from a fund authorized in A.R.S. § 11-604.

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The authority of the county boards of supervisors in A.R.S. § 11-409 is similar to the authority of the boards of trustees of school districts in A.R.S. § 15-443 to "employ and fix the salaries of teachers . . . and other employees necessary for the succeeding years" which we have interpreted as granting broad discretion to such boards of trustees to offer to their employees fringe benefits, including sick leave pay plans. Atty.Gen.Op. No. 76-178 & 73-21. In 1978, the Arizona Legislature authorized school districts to budget separately for payments to employees solely on account of sickness (A.R.S. § 15-1201.B), and in Atty.Gen.Op. No. 179-069 we recognized the authority of school districts to adopt sick leave pay plans.

Although a county has only such powers as have been expressly or by necessary implication delegated to it by the Legislature, the Legislature is not precluded from granting discretionary powers to counties. Zuravsky v. Asta 116 Ariz. 473, 569 P.2d 1371 (Ct.App. 1977) (construing A.R.S. § 11-251 which gives the Board of Supervisors the authority "to provide for the care and maintenance of the indigent sick of the county, erect and maintain hospitals," as leaving to the discretion of the supervisors what services shall be provided under the statute's broad and general mandate). In our view, A.R.S. §§ 11-409, 11-601, and 11-604 grant authority to county boards of supervisors the discretion to establish for county personnel a sick pay plan and a special fund from which to make payments to such personnel on account of sickness.

Sincerely,



BOB CORBIN
Attorney General

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